COA NO. 46084-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Petitioner,

v.

DAVID E. BLISS,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAMANIA COUNTY

SUPERIOR COURT CASE NUMBER 13-1-00054-5

HONORABLE JUDGE BRIAN P. ALTMAN

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# REPLY BRIEF

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ADAM NATHANIEL KICK
Skamania County Prosecuting Attorney
Attorney for Petitioner

Skamania County Prosecuting Attorney
P.O Box 790
240 N.W. Vancouver Ave.
Stevenson, Washington 98648

## TABLE OF CONTENTS

A. ARGUMENT.....1

B. CONCLUSION.....5

## TABLE OF AUTHORITIES

Table of Cases

WASHINGTON CASES Page

Kadoranian v. Bellingham Police Department, 119 Wn.2d 178, 829 P.2d 1061 (1992))..... .....1, 2, 3

Olympic Healthcare Services II LLC v. Department of Social & Health Services, 175 Wn. App. 174, 187-88, 304 P.3d 491 (2013).....4

State v. Fjermestad, 114 Wash.2d 828, 791 P.2d 897 (1990)..... 2

State v. Fowler, 157 Wn.2d 387, 139 P.3d 342 (2006) .....2, 3

Rules, Statutes, and Regulations

Washington State

RCW 9.73.090(2).....1, 2, 3

## I. THE PRIVACY ACT AUTHORIZES A DISTRICT COURT JUDGE TO ISSUE INTERCEPT ORDERS REGARDLESS OF THE LOCATION OF THE NON-CONSENTING SUSPECT BECAUSE THE LOCATION OF AN INTERCEPTION IS THE LOCATION OF THE IN-COUNTY RECORDING AND TO FIND OTHERWISE LEADS TO AN ABSURD RESULT.

As argued in the State's Motion for Discretionary review and supporting brief, RCW 9.73.090(2) clearly and unequivocally authorizes a district court judge to issue an order to intercept, record, or disclose an oral communication or conversation upon proper application by a law enforcement officer acting in the performance of official duties. Washington law does not support Mr. Bliss's bald assertion that this authority is limited to calls received within a county's geographic boundary.

In 1992, a Canadian citizen sued civilly for violation the privacy act, arguing that the statutory exceptions allowing police to lawfully record one-party consent conversations did not apply because the call was received in Canada instead of within Washington. Kadoranian v. Bellingham Police Department, 119 Wn.2d 178, 184, 829 P.2d 1061 (1992). The Supreme Court confirmed the legality of the call, holding that "[t]he privacy act does not limit the territory in which telephone calls may be intercepted, as long as the interception occurs in Washington." Id. at 183.

"Interceptions and recordings [under the privacy act] occur where made." Id. at 186.

In 2006, the Supreme Court confirmed that this rule applies to recordings made between states, reiterating "the test for whether a recording of a conversation or communication is lawful is determined under the laws of the place of the recording." State v. Fowler, 157 Wn.2d 387, 139 P.3d 342 (2006) (citing Kadoranian, *supra*). In Fowler, as part of an Oregon investigation in which Washington law enforcement played no part, a call from an Oregon victim to a suspect in Washington was recorded without the knowledge of the Washington resident. Id. at 344-45. The procedure was legal under Oregon law but not under Washington's privacy act. Id. at 345. The Court upheld admission of the recorded evidence in an ancillary Washington case, noting that Mr. Fowler, like Mr. Bliss, "fails to acknowledge or discuss this court's reasoning in *Kadoranian*, a case that controls the issue in this case." *Id.* at 346. The Court observed that all of the cases upon which Mr. Fowler relied, including State v. Fiermestad, 114 Wash.2d 828, 834, 791 P.2d 897 (1990), "discuss the privacy act in general, [but] none of them overrule or modify the central holding in Kadoranian." Id. There can be no question that so long as an interception is

legal in the jurisdiction of the authorizing order, the non-consenting suspect could be in Kansas or Kyrgyzstan.

Kadoranian's central holding governs here. Judge Reynier's intercept order was lawful because Mr. Bliss's conversation with his alleged victim was recorded in Skamania County pursuant to an intercept order properly obtained under RCW 9.73.090(2). To hold otherwise would require this Court to carve out an in-state exception to Kadoranian and Fowler under which law enforcement would be required to seek authorization in whatever county the non-consenting party happened to be located at the time of the call or, alternatively, to submit every intercept application to a judge of the superior court.

Mr. Bliss's interpretation is contrary to the plain language of the statue, language which specifically allows law enforcement to apply for authorization from a "judge or magistrate." RCW 9.73.090(2). Any call made to a mobile communication device would require authorization from a superior court judge. Thus, this interpretation effectively renders the "judge or magistrate" language inoperative in the majority of investigations brought under that section of the privacy act.

Further, such an interpretation would impose unnecessary hardship on court administration in one-judge counties such as Skamania. The issuing superior court judge would be precluded from hearing any case on which he or she authorized the interception, leading to administrative chaos and uncertainty. Washington's cannons of statutory construction prohibit interpretation that results in unlikely, absurd, or strained consequences, recognizing "that the legislative body did not intend absurd results." Olympic Healthcare Services II LLC v. Department of Social & Health Services, 175 Wn. App. 174, 187-88, 304 P.3d 491 (2013). The plain language of the statute, the rules of statutory construction, and simple common sense weigh against Respondent's argued interpretation.

This Court should take this opportunity to clarify any ambiguity in the privacy act and hold that a district court judge may authorize interception under RCW 9.73.090(2) for any otherwise lawful interception occurring within the issuing county regardless of where the non-consenting suspect is located. To hold otherwise is contrary to law and would lead to administrative chaos throughout the state.

## II. CONCLUSION

The Court of Appeals should grant the petitioner's motion for discretionary review and confirm the authority of district court judges to authorize intercept orders otherwise lawfully sought under RCW 9.73.090(2), regardless of the location of the non-consenting suspect.

DATED this 13th day of March, 2015.

RESPECTFULLY submitted,

By: _____
ADAM NATHANIAL KICK, WSBA # 27525
Prosecuting Attorney
Attorney for the Petitioner

**CERTIFICATE OF SERVICE**

Electronic service of this Reply Response to Motion for Discretionary Review, was effected today via email upon opposing counsel:

Lisa.tabbut@comcast.net
Lisa Elizabeth Tabbut
P.O. Box 1396
Longview, WA 98632-7822

chrislanz16@yahoo.com
Christopher R. Lanz
PO Box 1116
White Salmon, WA 98672

_____
Adam Nathanial Kick, WSBA # 27525
May 13, 2014
City of Stevenson, Washington

# SKAMANIA COUNTY PROSECUTOR

## March 16, 2015 - 1:04 PM

**Transmittal Letter**

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Lisa.Tabbur@comcast.net
ChrisLanz16@yahoo.com